



JUDGES MATTER

Judicial Service Commission Interviews

6 October 2016 – Afternoon session

Free State Division of the High Court

Interview of Advocate L Le R Pohl SC

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Chief Justice Mogoeng: Good evening Advocate Pohl.

Advocate Pohl: Good evening Chief Justice, ladies and gentlemen.

Mogoeng: For experienced counsel like yourself I do not have many questions. For how many years were you junior counsel?

Pohl: I have been senior counsel for almost 2 years of the 22 years I have been practicing at the Bar, but I was admitted two years before that and I acted then as a state advocate.

Mogoeng: Would you say that you are ready?

Pohl: I think so, yes.

Judge President Molemela: You have had several acting stints in our Division, have you not?

Pohl: That is correct.

Molemela: Would you say that in those stints you have covered a wide spectrum of cases?

Pohl: I did virtually everything that was given to me, as is indicated in my papers.

Molemela: Were you coping, or were there any particular fields where you experienced challenges?

Pohl: I was coping, twice I had to ask how to do the administrative work that was given, because as counsel you do not do that, but other than that I had no problems.

Molemela: On average, how long does it take you to deliver a reserved judgement?

Pohl: I think the longest it took me was about two weeks to deliver a judgment.

Molemela: You have had occasion to do circuit court duties?

Pohl: I did indeed, on both occasions that I acted. I once did the Virginia circuit court and on the other occasion I did the Bethlehem circuit court.

Molemela: You did not find it an inconvenience?

Pohl: Not at all, no.

Molemela: You were able to function in the circuit court on your own, without the assistance of your colleagues?

Pohl: Yes.

Molemela: You also had the opportunity of doing civil pre-trials?

Pohl: Yes, on one occasion.

Molemela: So you have been involved in case management?

Pohl: Yes indeed so.

Molemela: And how did you find it?

Pohl: I found the purpose was extremely important and if I may say so, Judge President Molemela, under your guidance I can say that I have even heard of complaints of attorneys that we are getting dates too soon in the Free State now. We are down to about two to three months before we can get trial dates, and that is exceptional in the circumstances. I think when I started articles in the 1980s we had a two year lapse before we got dates, and it is down to two to three months.

Premier Magashule: I was looking at the recommendations by various stakeholders. I am looking at the Black Lawyers Association, which says you will make a good judge and your judgments have been well thought and demonstrate your appreciation for the legal principles. But they say for the sake of transformation, they do not think at this stage that you should be considered. Why should you be considered?

Pohl: I think that each of us comprise the diversity of South Africa and each of us, where you are in life has a duty to do your bit for transformation. I think I have done

that, I try to set an example. I try to acknowledge and appreciate everybody that works with me and gets into contact with me, irrespective of who they are. In that sense I think I have contributed and will do so in future. Given the opportunity I wish to continue with that.

Magshule: You will continue with the process of transformation of judiciary and society generally.

Because we have been posing this question of languages, how many languages can you speak, read and write?

Pohl: I am only bilingual, I have some knowledge of phrases in Sesotho, but I am not proficient. If spoken slowly I can sometimes pick up the line of reasoning, but I am not proficient in any other languages but Afrikaans and English.

Magashule: You know dumela, okae, ke teng.

Pohl: Yes, Premier.

Commissioner Singh MP: I see the Black Lawyers Association has also commented that you have acted for approximately two terms and in your questionnaire I see it is the fourth term of 2013 and the third term of 2013. So you have not had much of an acting stint in the High Court. But they go on to say he acted for a period of approximately 2 terms, which is less than the required 3 terms. I do not know Chief Justice, maybe the JP can - is it a requirement that one has to serve three terms? Because the Black Lawyers Association say here he acted for a period of approximately 2 terms, which is less than the required 3 terms. So I am trying to ascertain that.

Mogoeng: Except for the Labour Appeal Court I never acted anywhere, before I was appointed judge of the Constitutional Court, not acting, but appointed.

Singh: That is an answer, but what I would like to know is acting for two terms only, do you think this has prepared you enough to sit in the position of being a judge in the High Court?

Pohl: Yes, Commissioner Singh, I think it certainly. Let me put it this way, I have been involved in advocacy training for a long time at the Bar. And the rationale behind the advocacy training, which we were taught by the English Bar Association, was that no matter at what level you are, there is always room for improvement. So I would not say I am perfect, I think everyone who that is a judge on this panel if they reflect on their first judgement and a recent judgement, it most definitely do improve. What I am saying is that there certainly is room for improvement, but I have never found any problem in the times that I acted with anything that was given to me and I literally got the whole spectrum. So I do not think it detracted in any way from my ability to function properly.

Singh: After the third term of 2014 and to date, were you offered in any positions to act?

Pohl: No, Commissioner Singh, what happened was that the previous acting judge president asked if I would act again and I requested him to release me from that, because of the fact that I was about to take silk and if you take silk it is a radical change in your practice and I wanted to establish my silk practice first. I have been able to do that since.

Judge President Mlambo: I just want to understand what is your take of the transformation agenda of the Constitution?

Pohl: First of all the Constitution in section 174 requires this honourable institution to recommend to the President, broadly speaking the race and gender composition of the country. In that sense, it should do so, but it has the proviso broadly speaking. Being a white male, this does not necessarily represent that, but I once again I say I am here because of the proviso and if it is in the judgment of this institution, then so be it.

Mlambo: I am not attacking your candidature, I have just asked you what is your take of the transformation agenda of the Constitution.

Pohl: Once again Judge President, maybe I did not understand you, but it is of course so that the preamble to the Constitution says we the people of South Africa recognise the injustices of the past and in as much as the injustices of the past relate to race and gender composition, it should be eradicated and that is the way I see it.

Mlambo: I see, and whose responsibility is it to see that this transformation agenda takes place, it happens?

Pohl: I think everybody in South Africa, all the diverse people of South Africa so that we may become united and if I may say, I recently read the judgement of the Constitutional Court where the Chief Justice was describing the City of Tshwane Municipality v Afriforum and in that judgement it clearly came through as well, and I found great guidance in that.

Mlambo: I do not know your background, but I regard myself as PDI, a previously disadvantaged individual. Do you fall in that category?

Pohl: I do not think so Judge President, I was born in 1959. I therefore had the benefit of the apartheid regime, in respect of school education, as well as university education and I consider myself, or the way forward in the way I can perhaps do transformation, is the knowledge that I have gained in that process, to part with that and I cannot just sit with it I have to now give back to the people of South Africa.

Mlambo: I think that would be my next question, to say if you recognise that you have been privileged in your more than 20 years practicing as an advocate, have you done anything to assist in the transformation agenda of the Constitution?

Pohl: I think I was about 35 years of age when the Constitution came into being, I embraced that and tried to wherever to recognise everybody. To be an example for my colleagues and my juniors especially. I also parted with my knowledge wherever I could and I did so in structured programs and on a one to one level, with other people who were not that privileged. So in that sense I did. I also took part in structures within the Bar, such as the fees committee, where we recently really made big strides to get in money so that junior counsel, especially black counsel could survive economically.

Mlambo: Have you taken any black pupils? How many?

Pohl: Yes, I had one that was allotted to me, at our Bar it gets allotted to you and that person is the longest practicing black member at the Bar, and I think he is about 20 years at the Bar.

Mlambo: That is good, have you taken any black juniors?

Pohl: In the two years, since I have taken silk, the cases where I had juniors were where juniors drew me in, and it did not comprise of any black juniors.

Mlambo: Because you say in your application that you specialise in insurance law, law of delict, veld fire cases, personal injury cases, administrative law and the law of contract. So you have never had an opportunity to take a black junior?

Pohl: Well not within the briefs that I had. Economics and briefing patterns of course dictate that, but I have never been in a case where the money was of such a nature that I could do that.

Mlambo: Have you done any pro bono work?

Pohl: I have listed in my CV a case where the Supreme Court of Appeal asked me to act pro amico and it was a prescription matter and the matter is reported in the law reports.

Commissioner Motshekga MP: In the '70s when I studied law, I was taught that jurisprudence comes from eminent lawyers like Johannes Voet, Pufendorf, John Locke. In the '80s when I taught law at UNISA, I repeated the same story to my students. Now I am not aware these days what are the sources of jurisprudence, which authors can I quote if I want to quote?

Pohl: I am not sure, I did not hear the beginning of the question. You said jurisprudence in the '70s, could you just repeat that please?

Motshekga: In the 70s I was taught that the sources of jurisprudence were eminent jurists, like Johannes Voet, Pufendorf and John Locke. Now in the '80s I taught law at UNISA for 10 years and repeated the same story. Now, today if I was to go back to class, which I intend to do, which should I use as the sources of jurisprudence?

Pohl: Well, I think that the Constitution is the supreme law of the land and one should look at all law through the lens of the Constitution first of all. In doing so, it does not mean that one has to jettison all the Roman Dutch law and jurisprudence you have referred to if I am correct, but one should develop it in accordance with the principles within the Constitution. Therein lies the gist of the answer which I can give you.

Motshekga: Pufendorf spoke about menschenwiede, in German. In Afrikaans it would be menslikheid, it would be humanity in English, and in Setswana or Sepedi or isiZulu it would be ubuntu. Would you agree that even before Pufendorf was born, African people knew about menschenwiede and menslikheid?

Pohl: What I know about Ubuntu and the principles thereof, actually corresponds a lot with, I am a Christian, Christian beliefs, in the sense that it is a humanitarian philosophy. The way I understand it is that I am not because I am, but because you are and because you are I am. That is the essence of what I understand from it and I most certainly agree that way before then it was prevalent in Africa.

Motshekga: Do you know that what is contained in the American declaration of independence and the French, which make equality, freedom and fraternity derives from this humanity of Ubuntu?

Pohl: I was not aware, no, but it makes sense.

Motshekga: So do you not think that in terms of transformation of our law, before we go into the sky to look for values and principles, we should actually study the indigenous legal thought and find out if the things we are looking for in the sky, already exist on the ground?

Pohl: Yes, I agree that if it exists one should explore it. We are diverse, but in the diversity a lot of benefit lies and in that diversity if it contains that we must explore it. That is why we are who we are and why we can be such a dynamic nation.

Motshekga: In 1961, the International Commission of Jurists spoke of the rule of law in the African context. Do you think there is a need to contextualise the rule of law?

Pohl: Once again in the decision of the Constitutional Court that I have referred to Chief Justice dealt with that and confirmed the rule of law, if I remember correctly, within the context of course that everyone is subject to the law and nobody, no politician, no political party, no government organisation is above the law. That is the one principle applicable to that.

Motshekga: Eminent jurists like Chaskalson, Bizos, Langa, Ntsebeza here, Moseneke, they ensured that in the interim constitution you have ubuntu as a value. Do you know why it was removed in the final Constitution, whether that was justified?

Pohl: I do not know why it was removed, I don't think it's justified. As I say, I think it corresponds with logic and humanity, which we must achieve, well try to achieve at least and in that sense I think it should be there.

Mogoeng: I thought you would tell him that in the Tshwane judgement, ubuntu is there.

Pohl: Yes it is there, indeed so.

Mogoeng: Never been removed.

Commissioner Hellens: Pohl I have made this joke before, they say how do you know someone went to Grey Bloemfontein, the answer is they tell you. I see you told us. On a serious note, could you explain the principle of legality?

Pohl: Yes well, legality is in the sense that it must be in accordance with the law, I think that is the best description that I have. That the action or the deed that is done, must be accord with the law in broader terms.

Hellens: In terms of review, we know there is a Promotion of Administrative Justice Act, PAJA, is there a review outside of PAJA?

Pohl: Yes, well you have the rule 53, common law as it were, procedure of review, but it runs hand in hand with PAJA, the way I understand it.

Hellens: Does the principle of legality come into the law of review?

Pohl: Yes, indeed it does.

Hellens: In what way?

Pohl: If what is being reviewed is something, let me put it this way, if what is reviewed is being outside of the law and the statute that might govern it, then it comes into play.

Mogoeng: Just to conclude, what is your judicial philosophy?

Pohl: I support Ubuntu, Chief Justice.

Mogoeng: Your judicial philosophy is that you support Ubuntu. You are excused.